UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
	)	Case No. 24-90213 (CML)
STEWARD HEALTH CARE SYSTEM, LLC, *at al.*,	)	(Jointly Administered)
Debtors.[1]	)	Case No.: 4:25-cv-01584

SUPPLEMENTAL DECLARATION OF ROBERT KEACH IN SUPPORT OF APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL (INCLUDING MOTION FOR IMMEDIATE STAY PENDING HEARING ON THE EMERGENCY MOTION FOR STAY PENDING APPEAL)

I, Robert Keach, being over 18 years of age and competent in all respects to testify, having personal knowledge of the facts set forth below, and under penalties of perjury, hereby state, swear, and affirm the following:

1. I am lead counsel for Dr. Manisha Purohit, Dr. Diane Paggioli, Dr. James Thomas, Dr. Thomas Ross, Dr. Michael Regan, Dr. Peter Lydon, Dr. Sridhar Ganda, Dr. A. Ana Beesen, Dr. Benjoy Zachariah, Dr. Barry Arkin, Dr. Bruce Kriegel, and Dr. Gary Miller (collectively, the "**Appellants**"), participants in certain deferred compensation plans sponsored by the debtors and debtors-in-possession in the above-captioned chapter 11 cases (the "**Debtors**").

2. I am familiar with the facts, circumstances, and proceedings in this case relevant to this declaration, which I submit in support of *Appellants' Emergency Motion for Stay Pending Appeal (Including Motion for Immediate Stay Pending Hearing on the Emergency Motion for Stay Pending Appeal)* (the "**Motion**")

3. On April 7, 2025, I filed a declaration in support of the Motion that described two

[1] A complete list of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at https://restructuring.ra.kroll.com/Steward. The Debtors' service address for these chapter 11 cases is 1900 N. Pearl Street, Suite 2400, Dallas, Texas 75201.

events that occurred on April 2, 2025 when the Bankruptcy Court rendered its Oral Decision[2] to grant the Turnover Motion because the transcript of the Oral Decision was not available at the time.

4. After I executed my declaration yesterday, Appellants received the certified copy of the Oral Decision. Attached as **Exhibit 1** to this declaration is a true and correct copy of that transcript.

5. In paragraph four of the declaration I represented that the DIP Lender informed the Bankruptcy Court that it considered Plan Assets to be cash collateral of the DIP Lender following the Oral Decision and subject to the cash collateral and debtor-in-possession financing documents and orders. The Court can find the representations that I referred to in paragraph four at Exhibit 1 (Apr. 2, 2025 Tr.) at 60:12-61:20.

6. In paragraph five of the Declaration, I described how Debtors' counsel confirmed the intent and need to immediately spend the Plan Assets and, additionally, proffered testimony of John R. Castellano, Debtors' Chief Restructuring Officer, that Debtors intended to spend the Plan Assets immediately following the effective date of the Bankruptcy Court's order granting the Turnover Motion on, among other things, payments to the DIP Lender. The Court can find the part of the proceeding I described in paragraph 5 at Exhibit 1(Apr. 2, 2025 Tr.) at 54:18-55:2; 71:4-75:9.

7. The Bankruptcy Court's ruling on the Turnover Motion can be found at Exhibit 1 (Apr. 2, 2025 Tr.) at 4:24- 50:9.

8. Appellants requested that the Bankruptcy Court keep the default 14-Day administrative stay under Rule 6004(h) ("Administrative Stay") in place at Exhibit 1 (Apr. 2, 2025

[2] Capitalized terms, unless otherwise defined, have the same meaning as in the Motion.

Tr.) at 4:24- 50:9.

9. Appellants requested that the Bankruptcy Court stay the effect of the Turnover Order pending appeal ("Motion to Stay Pending Appeal") at Exhibit 1 (Apr. 2, 2025 Tr.) at 56:22-60:11.

10. The Bankruptcy Court heard argument and evidence on both the Administrative Stay and Motion to Stay Pending Appeal at Exhibit 1 (Apr. 2, 2025 Tr.) at 60:12-75:4

11. The Bankruptcy Court denied Appellants' Motion to Stay Pending Appeal at Exhibit 1 (Apr. 2, 2025 Tr.) at 75:5-78:12.

12. The Bankruptcy Court modified the Administrative Stay to make the Turnover Order effective on April 11 at 11:59 pm CT at Exhibit 1 (Apr. 2, 2025 Tr.) at 78:14-79:23.

Solemnly affirmed and signed this 8th day of April, 2025, under the penalties of perjury.

/s/ Robert Keach
Robert Keach

EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§ CASE NO.24-90213-11
	§ HOUSTON, TEXAS
STEWARD HEALTH CARE	§ WEDNESDAY,
SYSTEM, LLC,	§ APRIL 2, 2025
DEBTOR.	§ 3:01 P.M. TO 3:45 P.M.

ORAL RULING

BEFORE THE HONORABLE CHRISTOPHER LOPEZ
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:	SEE NEXT PAGE
CASE MANAGER:	ROSARIO SALDANA
ELECTRONIC RECORDING OFFICER:	YESENIA LILA

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APPEARANCES:

FOR THE DEBTORS:	WEIL, GOTSHAL & MANGES LLP David Cohen, Esq. Robert Keach, Esq. Robert Berizen, Esq. 767 Fifth Avenue New York, NY 10153 212-310-8000
FOR THE PLAN PARTICIPANTS:	DIAMOND MCCARTHY LLP Allan Diamond, Esq. Two Houston Center 909 Fannin St., 37th Floor Houston, TX 77010 713-333-5100
FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS:	AKIN GUMP STRAUSS HAUER & FELD Sarah Schultz, Esq. 2300 N. Field St., Ste. 1800 Dallas, TX 75201 214-969-2800
FOR FILO SECURED PARTIES:	MILBANK LLP Michael Price, Esq. 55 Hudson Yards New York, NY 10001 212-530-5000

(Please also see Electronic Appearances.)

HOUSTON, TEXAS; WEDNESDAY, APRIL 2, 2025; 3:01 P.M.

THE COURT: Okay. Good afternoon, everyone. This is Judge Lopez. Today is April 2nd. I'm going to call the 3:00 p.m. case, Steward. I will turn on my camera so we can all see each other and we'll see where we are.

Anyone online wish to make an appearance, please hit five, star, and I will unmute your line. There's a 973 number. A 973 number.

MR. BERIZEN: Your Honor, I believe that's me. Robert Berizen, Weil Gotshal & Manges, on behalf of the Debtors.

THE COURT: Okay. Here's a 713 number. A 713-539 number.

MR. DIAMOND: 539?

THE COURT: Yes.

MR. DIAMOND: Yeah. Good afternoon, Your Honor. This is Allan Diamond with Diamond & McCarthy on behalf --

THE COURT: Oh.

MR. DIAMOND: -- of the plan participants.

THE COURT: Yes, absolutely. Good afternoon.

Anyone else on the line wish to --

MR. DIAMOND: Good afternoon.

THE COURT: -- make an appearance?

Mr. Keach, I forgot to look in the courtroom first. I was so busy looking online. Good afternoon.

MR. KEACH: Good afternoon, Your Honor. Robert Keach for the Debtors.

THE COURT: Good afternoon.

Anyone else wish to make an appearance, please hit five, star, and I will unmute your line.

Okay. Before I go to the oral ruling, I think, Mr. Cohen, I thought there may have been some other Stewart stuff we were going to -- that was on the agenda already because I know I picked the time because it was already something there, and I don't know if it's still there.

MR. COHEN: Your Honor, David Cohen for the record. I believe everything else has been adjourned. So this is the only matter on the agenda today.

THE COURT: Ah, okay. Got it. Okay. Well then I will put on my cheaters and I will get to reading. Okay.

Oh, the -- just give me one moment. Before I start, Mr. Cohen, can you confirm that you can hear me okay before I start reading?

MR. COHEN: We can hear you, Your Honor. Thank you.

THE COURT: Yesenia, are we good? Huh?

THE CLERK: Yeah.

THE COURT: Okay.

MR. COHEN: We can hear you well.

THE COURT: All right. Perfect. Okay.

Well, we're here in connection with an oral ruling

on the Debtors' motion at 3277. This is Judge Lopez. This oral ruling will begin. I appreciate everyone. For those who are on the line, I'd ask that you just mute your line just so I can just read this into the record.

I would note it is 19 single-spaced pages. So you're going to be here for a while. Okay.

The Steward Health Care Debtors started these Chapter 11 cases in May of 2024. At the time of filing, Steward was the largest private physician-owned health care system in America. It provided care to over 2 million people annually and employed over 30,000 people.

Several thousand of these employees were primary and special care physicians. The hospital system spanned over 10 states, had over 30 hospitals, and included several hundred facility locations like ambulatory surgical centers and diagnostic imaging centers.

The reason Steward ultimately filed these Chapter 11 cases is well documented in this case. During the case, Steward sold almost all of the hospitals.

The sales involved complex transactions between secured creditors, landowners, and multiple state and federal government agencies.

One hospital I know closed, and I still think about that hospital and its patients all the time. Several hospitals almost closed. I've held hearings whenever needed

to ensure access to the Court for any creditor, agency, state government official, doctor, vendor, or employee. Not every case I have needs that much attention; this one does.

It's a really big case with constant moving parts. Steward has accomplished much during these Chapter 11 cases. Many hearings also involve unfortunate circumstances and results for either a creditor or the estate.

The role of courts is to rule based on a strict reading of the text, applicable case law, and the record. Today's no different. I'm going to provide some background, then law, then apply the law to the facts, and then rule on the motion.

On the petition date, Steward moved for an order allowing them to pay employees up to the statutory priority amounts permitted under the Bankruptcy Code.

In the same motion, Steward also sought permission to terminate two deferred compensation plans retroactive to the petition date. The two deferred compensation plans are the Steward Health Care Deferred Compensation Plan, which I will refer to as the Steward Plan, and the IASIS Plan. And for the record, it's spelled I-A-S-I-S.

I will refer to both plans collectively as the plans. Under the plans and related trust agreements, Steward established separate trusts that held the deferred compensation assets managed by the Trustees.

The Court ultimately granted Steward's motion and authorized Steward to terminate the plan. Based on the Court's order, Steward terminated the plans retroactive to the petition date and sent communications to plan beneficiaries.

Steward also informed the Trustees that Steward was insolvent. And on August 12th, 2024, Steward informed plan beneficiaries that they were general unsecured creditors and could submit a proof of claim in the Steward bankruptcy cases.

The plans have been terminated about a year, but the Trustee still manages the assets. These terminated plans and the related trusts are the focus of the dispute before the Court.

In November of 2024, Steward filed a motion that I will call the Rabbi Trust motion. The Rabbi Trust motion asked for an order under Sections 105, 363, 541, and 542 of the Bankruptcy Code to authorize and direct the Trustees to transfer the trust assets to Steward or to liquidate the trust assets and transfer the proceeds to Steward; to authorize Steward to exercise ownership rights over the trust assets; to authorize Steward and the Trustees to terminate the trust and discharge all the Trustees' obligations to the trust; and to authorize Steward to terminate the respective record bookkeeping, excuse me, yeah, record-keeping service agreements; and to discharge all the record keeper's obligations.

The Rabbi Trust motion also included an objection to Dr. Manisha Purohit, and that's spelled P-U-R-O-H-I-T, a letter filed at ECF 3134, asking the Court to prioritize payment of deferred compensation funds to all previous or current employees of Steward.

In December of 2024, certain plan participants objected to the Rabbi Trust motion and asked the Court to deny the requested relief. For the record, Dr. Purohit, P-U-R-O-H-I-T again, is one of the objecting parties.

The objectors do not believe Steward has the right to use trust assets to pay creditors. Instead, they want the plans to remain for the sole benefit of the plan participant and subject to ERISA regulations as a funded deferred compensation plan.

The terms funded and unfunded have a specific legal meaning that I'll discuss in a moment, but for now, I'll continue with the background facts.

The hearing to consider the Rabbi Trust motion was originally scheduled for February 14, 2025. It was later adjourned to March 11. Eight days before the scheduled March 11 hearing on March 3rd, the objectors filed an emergency motion with this Court asking to stay hearing on the Rabbi Trust motion.

The objectors also started an adversary proceeding by filing a complaint for injunctive, equitable, and

declaratory relief and a request for a class action. And that's adversary proceeding 25-03066. They also filed a motion to withdraw the reference.

On March 7th, this Court heard argument on the objector's stay motion and denied it. The Court's reasons for denying the stay motions were stated on the record, and among the reasons that the object -- was that the objectors filed an objection to the Rabbi Trust motion in December 2024 and expressed no hesitation about proceeding as a contested matter rather than an adversary proceeding.

A hearing date was set out three months to give parties time to prepare and conduct discovery. The Court heard nothing from objectors during this time. And then at the last minute, they started an adversary proceeding which one could construe as an effort to delay a hearing on the Rabbi Trust motion.

Bankruptcy Courts routinely address issues related to Rabbi Trusts, and there's nothing especially difficult or different about the plans or the related trust in this case.

Counsel for one of the objectors is a nationally-recognized bankruptcy lawyer who has argued these issues many times before Bankruptcy Courts, and I personally cannot think of anyone better in America to litigate these issues in a Bankruptcy Court than who they have.

That said, although the Court denied staying the

hearing, based on the concerns raised by the objectors about certain discovery issues, the Court adjourned the March 11th hearing to March 26th.

On March 13, the objectors filed with the District Court for the Southern District of Texas an emergency motion seeking a stay of the hearing on the Rabbi Trust motion.

On March 24, the District Court did not grant a stay. The Court conducted a hearing on the Rabbi Trust motion on March 26th, and it concluded on March 27. Over 200 exhibits were submitted and entered into the record.

The Court heard testimony from several fact witnesses and two experts. After the hearing, the Court took the matter under advisement. The Court now rules.

A central dispute is about whether the plans and the related trust qualified as, quote, Rabbi Trusts or Top Hat plans. If they are Top Hat plans, then by definition, all trust assets are property of the Steward Bankruptcy Estates and subject to the general claims of creditors.

The trusts currently hold about 60 million in the aggregate, so it's a significant source of assets to pay potential creditors.

The Unsecured Creditors Committee supports the Rabbi Trust motion. If, however, they're not Top Hat plans, objectors ask the Court to recognize that the trust assets are subject to an ERISA statutory trust, or the Court could impose

a constructive trust to make them solely for the benefit of the plan participants.

Objectors believe the Court could also reform the plans to make them funded plans subject to ERISA. In other words, no matter how it's accomplished, objectors don't believe trust assets currently are or should become subject to the general claims of creditors in this case.

I'll now turn to some general information about Rabbi Trusts or Top Hat plans. Rabbi trusts originally got their name due to a 1980 IRS letter ruling on a trust for the benefit of a rabbi.

That's private letter ruling 811-3107, December 31, 1980. I would also note that the Occidental Petroleum Corp. v. Wells Fargo Bank, 117 F.4th 628, 633 pin cite, Fifth Circuit 2024 case, cites the Bank of America N.A. v. M-O-G-L-I-A, 330 F.3rd 942, pin cite 944, Seventh Circuit 2003 case, discussing this very point.

A Rabbi Trust is essentially an unfunded arrangement between an employer and an employee. For the employee, the Rabbi Trust provides that the employer will pay deferred compensation benefits promised to an employee even if there's a change in control of management.

The employee has to pay into it using assets of the company subject to limitations. Employees receive distributions once retired. Thus, they are taxed at a lower

rate than while employed, at site 2, Qualified Retirement Plan Section 24, Section 56, 2024 edition.

Rabbi trusts are also exempt from the funding, vesting, and fiduciary requirements under ERISA. I'll cite Reliable Home Health Care, Inc. v. Union Central Insurance, 295 F.3rd 505, pin cite 512, Fifth Circuit, 2002.

The employer is considered the owner of the trust, and income the trust generates is taxable to the employer, McAllister v. Resolution Trust Corp, 201 F.3rd 570, pin cite 573, Fifth Circuit, 2000.

This allows, quote, the participants to defer tax liability on their individual shares until asset distributions under the terms of the plan. Same case. It would make sense that an employee would want this deferred compensation to be outside of the reach of the company's creditors.

But that defeats the purpose of the Rabbi Trust. Creditors of the employer company have access to the Rabbi Trust assets, and it is the placing of assets in a trust that avoids triggering adverse tax results for the plan beneficiary.

Let me provide some examples of an adverse result. Taxpayer may be subject to taxation on an amount before actually receiving it if the employee is treated as having constructively received the amount.

So, for example, if the money is set aside and the

taxpayer can access it without substantial limitations, like the ability to receive a lump sum. See, for example, 26 CFR, Section 1.451-2(a).

An employee can also be taxed if the employee receives the economic benefit of the compensation. That's when assets are unconditionally and irrevocably paid into a trust to be used for the employee's sole benefit. I'll cite to that Rev. Rul. 60-31 to 1960-1.

The concept behind the economic benefit doctrine was codified in 26 CFR 1.83, which governs the taxation of compensatory transfers of property. Thus, an employee would be taxed on the amount of -- excuse me -- thus, an employee would be taxed on an amount the employer places outside the reach of its creditors when the employee's rights to the amount is not subject to a substantial risk of forfeiture.

And to avoid early taxation of benefits, a deferred compensation plan must place substantial restrictions on an employee's ability to receive the benefits.

For an example, an employee cannot have the right to demand an immediate lump sum or receive the entire deferred compensation plan benefit at any time. And as I said earlier in this case, there are two deferred compensation plans at issue here, the Steward plan and the IASIS plan, I-A-S-I-S.

The Steward plan was established in November of 2011 and was restated effective December 31, 2015. And I'll cite

to the Steward admitted Exhibits 2 through 4. The introductory paragraph of the Steward Plan says its purpose is to, quote, aid Steward in retaining and attracting executive employees by providing them with tax-deferred savings opportunities, Exhibit 2; and that the plan provides a select group of management and highly-compensated employees within the meaning of ERISA Sections 2012, 301(a)(3), and 401(a)(1) with the opportunity to elect to defer receipt of specified portions of compensation and to have those deferred amounts treated as if invested in a specified hypothetical investment benchmarks.

Section 4.01 is called participation. Since the plan is limited to physicians and executives who, one, meet such eligibility criteria as the board shall establish from time to time, including the requirement that such executive is a member of a select group of management and highly-compensated employees; two, has been notified by the board that she or he has been designated by the board for participation in the plan; and three, elects to participate in the plan by filing a deferral agreement under rules established by the plan and the board.

To qualify as highly compensated, the board initially set a salary floor of $150,000. See Steward's Exhibits 4 and 5. In 2019, the board amended the plan to allow, along with physicians and executives, select highly-

compensated physicians assistants, nurse practitioners, and certified registered nurse anesthetists, all of which had to earn at least $180,000.

And you see that in Steward's 6 through 8, Exhibits 6 through 8, which are board resolutions, I'd note that the Potter Declaration at paragraph 5, Steward 40, Exhibit 40, speaks to this too.

The plan administrator annually circulated by electronic email -- excuse me, by electronic mail an enrollment announcement and a, quote, plan at a glance, close quote, document to eligible participants. That's Steward Exhibits 7 through 9. I'd cite Driscoll Declaration in paragraph 27, which is Steward Exhibit 44.

The October 2023 plan at a glance, for example, stated that unlike a 401(k) plan, if Steward Health Care becomes insolvent, Steward's creditors will have access to your account.

You'll have the rights of a general unsecured creditor in such event. Look at Steward Exhibit 7. The Steward plan document, Steward plan summary, and plan at a glance were accessible to plan participants on the plan resources tab of an online enrollment site.

Steward Exhibits 10 through 13 show the web pages and their contents. The 2024 plan summary had a Section titled Security of Deferred Compensation, and it says that as

it is a non-qualified deferred compensation plan, it is considered both unfunded and unsecured, making your employer's promise to pay the full value of your deferred compensation plan accounts and the additional retirement income as an unfunded and unsecured promise to pay in the future.

As a participant, you are an unsecured creditor of Steward Health Care and its subsidiaries and your payments must come from the assets of the corporation. The company has established a Rabbi Trust to hold assets which -- with which to pay benefits under the plans to provide the maximum security permitted by law.

Section 9.01 was titled Unfunded Plan, and it provides that the plan is, quote, is intended to be an unfunded plan maintained primarily for the purpose of providing deferred compensation for a select group of management or highly-compensated employees, all within the meaning of Sections 201, 301, and 401 of ERISA.

All payments pursuant to the plan shall be made from the general funds of employers and no special or separate fund shall be established or other segregation of assets made to assure payment.

No participant or other person shall have under any circumstances any interest in any particular property or asset of employers as a result of participating in the plan, and that employers may, but shall not be obligated to, create one

or more grantor trusts, the assets of which are subject to the claims of the employer's creditors to assist in accumulating funds to pay its obligations under the plan. That's Steward Exhibit 2.

Section 9.04, titled Rabbi Trust provides that Steward may establish a Rabbi Trust for the purposes of funding benefits payable under the plan or under any other non-qualified deferred compensation plan.

The assets of such Rabbi Trust with respect to benefits payable under the plan shall remain subject to the claims of general creditors, Steward Exhibit 2, at 57.

Steward established a Rabbi Trust under a certain trust agreement with Deutsche Bank Trust Company. In 2016, Steward appointed Matrix Trust Company as successor Trustee. This is all found in Steward Exhibit 19.

The assets of Steward Trust primarily consist of corporate-owned life insurance contracts and certain current or former employees to fund Steward's obligations under the plan. Steward Exhibits 20 and 21 show that Steward used money from its accounts to invest in insurance policies. Steward was the sole beneficiary of the policies.

The trust agreement says that trust assets remain subject to the claims of Steward's creditors in the event of Steward's insolvency, and that, quote, neither the Trustee nor any plan participant or beneficiary shall have any right to

compel such additional deposits.

It also says that it is the intention of the parties that this trust shall continue an unfunded arrangement and shall not affect the status of the plan as an unfunded plan maintained for the purpose of providing deferred compensation for a select group of management or highly-compensated employees for purposes of ERISA.

Section 3.1 of the trust agreement says that the Trustee shall cease payment of benefits to plan participants and their beneficiaries if the company is insolvent, Steward Exhibit 19.

The trust agreement specifies that the company is considered, quote, insolvent if Steward is subject to a pending proceeding as a Debtor under the Bankruptcy Code.

Section 3.2 says that if at any time the trust has determined that the company is insolvent -- excuse me -- if at any time the Trustee has determined that the company is insolvent, the Trustee shall discontinue payments to plan participants or their beneficiaries and hold assets of the trust for the benefit of the company's general creditors.

The IASIS plan was established in July 2006 by IASIS, a company which was acquired by Steward in 2017. In March of -- excuse me, in March of 2009, IASIS filed a Top Hat plan statement with the Department of Labor about the creation of the Top Hat plan. And that's at Exhibit 23.

The IASIS plan document says that its purpose is to be an unfunded plan primarily for the purpose of providing deferred compensation for a select group of management or highly-compensated employees and intended to be within the exemptions of ERISA.

The plan is intended to be unfunded for purposes of both ERISA and the Code. The plan is not intended to be a qualified plan under Sections 4.01(a) of the Code. Rather, the plan is intended to be a non-qualified plan, the Code being the Internal Revenue Code.

The IASIS plan was frozen effective 2017, meaning that no new deferrals could be made into the IASIS plan. Lombardo testified about that on the first day of the hearing, March 26th, at transcript 92, lines 18 through 22.

Section 3.01 of the IASIS plan defines employees eligible to participate as those whose basic compensation is at least equal to the current compensation of highly-compensated employees, which in 2017 was $120,000, and whose job classification was CEO, COO, or Chief Nursing Officer of a hospital, corporate officer at the director level or above, or a physician employed by a participating company or otherwise designated employees, Steward Exhibit 1.

Section 6.02 says that the assets of the trust with respect to benefits payable to the employees of each participating company shall remain the assets of such

participating companies subject to the claims of its general creditors.

Any payments by a trust of the benefits to a participant under the plan shall be considered payment by the participating company and shall discharge the participating company of any further liability on the plan for such payments.

IASIS established a Rabbi Trust with Wells Fargo and later Principal replaced Wells Fargo. These are Steward Exhibits 25 and 26. The assets of the IASIS Trust consist of mutual funds, cash, and cash equivalents as a means to fund Steward obligations under the plan.

Section 1.4 of the trust agreement says the principal of the trust and any earnings thereon shall be held separate and apart from other funds of the company -- as funds of company and shall be used exclusively for the uses and purposes of plan participants and general creditors as here set forth.

Plan participants and their beneficiaries should have no preferred claim or any beneficial ownership interest in any assets of the trust. Any rights created under the plan and the trust agreement shall be mere unsecured contractual rights of the plan participants and their beneficiaries against company.

Any assets held by the trust will be subject to the

claims, the company's general creditors under federal and state law in the event of an insolvency.

And Section 3.2 of the trust agreement says that at all times during continuation of the trust as provided in Section 1.4, the principle of income of the trust shall be subject to the claim of general creditors of the company under state, excuse me, under federal and state law. That's Steward Exhibit 25.

Section 3.13 of the trust agreement provides that if at any time Trustee has determined that the company is insolvent, Trustee shall discontinue payments to plan participants or their beneficiaries, shall hold the assets of the trust for the benefit of the company's general creditors.

Section 5.01 stipulates that the deferred compensation amount as defined in Section 2.13 says this account is a separate book reserve account and consistent and at all times assets of the participating company are subject to the claims of the participating company's general creditors.

Finally, the IASIS Plan also stipulates that any employee or participant shall not have at any time any interest in or to such deferred compensation account or in any investment or asset thereof.

Participant's deferred compensation account shall not constitute or be treated as a trust or trust fund of any

kind. The objectors are all former physicians at Steward who participated in the Steward plan.

But I would note that Dr. Purohit worked at IASIS before it was acquired by Steward as stated in Dr. Purohit's Declaration at paragraph three, Participants Exhibit 8. She also testified about that on the stand. She participated in the IASIS plan and then the Steward plan.

Each of these physicians, the objectors physicians, has earned at least $350,000 with additional compensation and benefits. That is found at Steward Exhibits 34 through 36 and 45 through 49.

Before analyzing the merits of the objection, objectors raised an issue about the procedural posture of the dispute. As I noted earlier, the Court is deciding the Rabbi Trust motion and the objections which created a contested matter.

Objectors raised in connection with starting the adversary proceeding that the relief requested includes Section 542 of the Bankruptcy Code, which implies that an adversary proceeding is required. And an adversary proceeding under Bankruptcy Rule 7001 requires a separate complaint and incorporates additional Federal Rules of Bankruptcy procedure.

Objectors also note that their adversary complaint that they filed would serve that purpose. A few points here.

First, the plans are terminated. So there's no

additional enrollment. The Trustees are in control. So if I find that the plans were Top Hat plans, that the trust assets are property of the estate, and that this was a proper Top Hat plan, then the assets are property in the estate under Section 541 of the Bankruptcy Code. And by law, the objectors are general unsecured creditors with no legal right to the funds.

Creditors have the right to file a claim in bankruptcy and join in any distribution in accordance with the priority set forth in the Code. But they're entitled to no greater right and no less right than other creditors of equal rank.

Steward has the right to ask for the authority to terminate the trust under Section 363 of the Bankruptcy Code. So if I order that, then the Trustee agreement -- if I order that the trust can be terminated, then the Trustee agreements by themselves require the trust to turn over the funds to Steward.

In other words, there's no real turnover action required under Section 542. It just happens by operation of the agreements. Nothing would force them to do so here.

The Trustees are also not contesting the motion. They're not the ones -- and they're the ones who technically would have legal standing to contest a request ordering them to turn over the funds under Section 542 anyway.

I don't really think this is a Section 542 action

anyway. I don't need to force the Trustees. And regardless, the Trustees are not objecting. If I order a return of the funds, I can do that under Section 363 of the Bankruptcy Code because I'm authorizing the Trustees to -- I'm authorizing the Debtors to terminate the trust and relieve of the Trustees of their duties and the bookkeepers of their duties.

And the funds held in the trust are already subject to the claims of creditors if I find that this is a Top Hat plan. And it's already subject to property of the estate because that happens on the petition date.

The Debtors can hold the money in a segregated account if they wanted. But if the money is subject to the claims of creditors, all I'm doing is telling the Trustees they don't have to be a part of the bankruptcy process anymore.

They can give the money to the Debtors. And the Debtors will need a further order of this Court to be able to use any portion of that money. There's no secrets about that.

Finally, I would remind everyone that the Rabbi Trust motion was filed in November of 2024 and an objection was filed in December of 2024. The objection raised no contested versus adversary case issues.

Months later, the adversary was filed on the eve of trial. I won't say any more than that other than I find a contested matter is appropriate here and I can afford relief.

Next, I turn to the applicable Top Hat plan language and the statute. And with all matters, I turn to statutory interpretation. Text is always the alpha. See Whitlock v. Lowe, 945 F.3rd 943, pin cite 947, Fifth Circuit 2019 case; Bedrock Ltd, LLC v. United States, 541 U.S. 176, pin cite 183, 2004 case.

The preeminent canon of statutory interpretation requires the Court to presume that the legislature says in a statute what it means and means in a statute what it says there. That's a quote from the United States Supreme Court.

The ERISA Top Hat plan when you quote and you look at the applicable language, 29 USC 1101(a)(1), has to be maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly-compensated employees.

Thus, I think about this in two prongs. Top hat plan has to be, one, unfunded; and two, maintained primarily for the purpose of providing deferred compensation for a select group of management or highly-compensated employees.

When determining whether a plan is funded or unfunded, a Court must look to the surrounding facts and circumstances.

Second, a Court should identify whether a policy is funded by a res, R-E-S, separate from the general assets of the company. In doing so, the mere fact that a plan is funded

through an insurance policy and the Reliant case, Fifth Circuit case, confirms this, if a plan is funded through an insurance policy, it's not dispositive of the plan's funded or unfunded status for ERISA purposes.

A plan is considered unfunded so long as participants do not have, quote, a legal right any greater than that of an unsecured creditor to a specific set of funds from which the employer is under the plan obligated to pay the deferred compensation. That's the Reliable Home case, 295 -- I said Reliant earlier; I meant Reliable Homes, 295 F.3rd at 513, and it was quoting Demer, D-E-M-E-R, v. Exte Bank, E-X-T-E, B-A-N-K, Deferred Comp Plan B, 216 F.3rd 283, pin cite, 287, Second Circuit 2000 case.

The Fifth Circuit in Reliable Homes also held that evidence of the plan's unfunded status lies in the fact that participants did not incur tax liability in connection with funds transferred to the plan for their benefit. That's at pin cite 514 and 515.

Based on the record, the Court finds that both plans meet the unfunded requirement. We start with the words of the plans.

Steward plan document says that it is, quote, intended to be an unfunded plan and that no funds are to be set aside beyond the Rabbi Trust, which is accessible to general creditors.

The Rabbi Trust documents are all admitted into the records. They say they're assets subject to the claims of company's creditors. Steward used deferred compensation to acquire life insurance policies owned by Steward. Proof of that is in the record, Driscoll Declaration at paragraph 32, Steward Exhibit 34.

The policies show that Steward was the beneficiary. Steward Exhibits 21 and 22, Castellano Declaration, Steward Exhibit 43 at paragraph 7 reports the same. That is consistent with the Fifth Circuit's analysis in Reliable, 295 F.3rd at 514. So it works.

The premiums for the insurance policies were paid from Steward's general fund, Castellano Declaration at paragraphs 8 and 10. The evidence shows that it did not come from money withheld from specific participants' paychecks. Castellano support that at paragraphs 8 through 10.

And that's important. Remember that is what makes these plans different than regular ERISA-funded plans. Participants also did not pay income tax on deferrals to the plan. See Driscoll Declaration at paragraph 20.

They never had to, and I heard of no real complaints and there are nothing -- no complaints about that either. Because the participants did not incur tax liability during the year they made contributions, the plan is considered unfunded. And that's really important for the reasons I

stated earlier.

The IASIS plan was unfunded too. The plan documents describe it as unfunded. It states that it's intended to be for the -- it's intended to be unfunded for the purposes of both ERISA and the Internal Revenue Code. That was Steward Exhibit 1.

IASIS established a Rabbi Trust using the IRS model language for Rabbi Trust, Steward Exhibit 25. The trust agreement states that the trust funds were to be used exclusively for the uses and purposes of plan participants and general creditors, Steward Exhibit 25.

IASIS enrollment information explained to eligible employees that deferrals and tax earnings are tax deferred and you don't pay income taxes on that money until it is paid to you, Steward Exhibit 43.

Plan participants did not incur tax liability either. The deferred compensation remained an asset of the company; thus, the plan is unfunded.

Objectors, however, don't want the plans to be unfunded. They want the Court to refer -- excuse me -- to reform them to be funded plans to find an ERISA statutory trust exists or to place a constructive trust over the assets.

To be clear, they don't advocate to incur retroactive tax liability in these scenarios. They also don't dispute that Steward and IASIS plan documents said the trust

would be unfunded and assets would be subject to the claims of general -- the general claims of creditors.

But I understand they're legitimately concerned about losing their deferred compensation. And some of the funds are -- some of the amounts are significant, and I understand that, and that's understandable.

So they all raise all forms of arguments in hopes that one of them changes the deal they agreed to and to enforce the agreement differently, as it were to occur outside of bankruptcy.

The Court disagrees with all of their arguments, however, including a request for estoppel here. The record is robust and clear. Bankruptcy Courts shouldn't rewrite contracts. Neither should any Court if the terms are plain and enforceable on their face.

And there's no evidence of any or even allegations that there was fraud at the outset of these documents. Steward had the burden of proving matters today. It was their motion.

They've done so in my opinion by more than a preponderance of the evidence. The objectors argue that the IASIS plan was not unfunded because at some point, it looks like some funds were placed into an account that was not there the same time.

But there's no evidence that the IASIS Trustee

stopped managing these trust assets. Steward Exhibit 41, which is Lombardo's Declaration, at paragraph 15 says that the IASIS plan was always a Top Hat plan and it was unfunded and established to provide a select group of management or highly-compensated employees an opportunity to defer specified income.

There's no evidence in the record that refutes this testimony. Both the documents and the testimony proved that the plans were unfunded. Nothing the objectors raised comes close to requiring a different conclusion or a drastic remedy of somehow changing the deal that they all agreed to by changing an unfunded plan to a funded one.

The objectors also argue that an approximate 9 million distribution made to the plan participant while Steward was insolvent shows evidence of potential fraud and thereby requires the conversion to a funded plan.

They show that that may show that it was evidence that it was being treated as a funded plan. There was testimony that Steward approved taking loans on trust assets and making a larger than normal distribution to plan participants and then filing for bankruptcy about one month later.

Lombardo testified to this on March 26th, page 70, line 21 through line -- excuse me -- line 21, starting there and continuing. Steward also appeared to allow plan

participants to deferred income without expressly disclosing when it may have been insolvent.

Objectors believe this proves they treated the plans as funded rather than unfunded, and the Court disagrees. The substantial distribution to plan participants appears to have been made shortly before the Chapter 11 cases were started.

There's no evidence in the record of fraud or theft of assets and this Court gets no impression of any such either. But it was about twice as much as prior plan distribution.

The funds appear to have come from a loan taken against Steward plan policies. And Section 16.3 of the Steward Rabbi Trust documents say that no benefit payable out of the trust to any person shall be subject to a lien or a pledge, and any attempt to pledge an amount payable is void, and the payee won't be subject to a legal process.

This Section protects a payee from receiving a payment and then being subject to a legal process by a third party. This protects payees. It doesn't say the company can't pledge assets now. So I don't see any fraud or illegality here. But in any event, the process by which assets were pledged and payments to payees were made, is at most a pre-petition breach of contract giving rise to a pre-petition claim.

I also note that bankruptcy is a specially well

equipped to deal payments where parties receive cash while the Debtor may be insolvent or a party receives a distribution for less than reasonable equivalent value.

Congress gives Debtors tools to analyze these potential rights to bring such claims. And there is a robust Creditors Committee who I am confident is analyzing all these issues along with the Debtors and the merits of any such claims. Bankruptcy is really good at dealing with these issues. But there's no evidence of fraud.

Objectors also argue they didn't get notice the company was insolvent. For example, Dr. Peroits (phonetic) Declaration at paragraph 7 and Dr. Lydon, L-Y-D-O-N, at paragraph 6 thru plan participants Exhibits 8 and 10. There was no contractual legal requirement to do so.

Irrelevant trust provisions are Sections 3.1 and 3.2 of the IA Assistant Trust agreements. These Sections provide that in the event of insolvency, the company has the duty to inform the Trustee and the Trustee is required to discontinue payments under the plans.

When there's a failure to adhere to the terms of the Rabbi Trust, though, allegedly prohibited payments to a former executive -- while the company was insolvent -- company's creditors retain an interest in the funds such that they have the right to bring an action to recover funds paid out in violation of the Rabbi Trust.

That's c -- and that's what I was talking about. It's also supported in cases like *In re: Amcast*, A-M-C-A-S-T, Industries Corp -- *Industrial Corp*, 365 BR 91, pin site 102 and 110 and 114 talks about this as well -- Bankruptcy Southern District of Texas -- excuse me, Southern District of Ohio, 2007 case.

So based on the record, I'm going to find that the plans are both unfunded. And in addition to being unfunded, a Top Hat plan must also be maintained by an employer and two, primarily for the purpose of providing deferred compensation for a group of highly selected men -- excuse me, for a select group of management or highly compensated employees.

Both plans were maintained by Steward, right. And the IASIS plan was taken over by Steward. Lombardo said that the IASIS plan was always maintained as a Top Hat plan. None of that is contested. So that's Steward Exhibit 41, Lombardo's Declaration at paragraph 15. So it was maintained by an employer.

The evidence in the Record is also clear that the primary purpose of the plan was to provide deferred compensation based on the express language of the plan and the testimony of witnesses like Lombardo.

The evidence in the related trust documents also support that each plan was structured and treated as a deferred compensation plan. The objectors don't believe the

plans are Top Hat plans.

Whereas, a different question that whether the plans are primarily for the purpose of providing deferred compensation.

So now let's turn to the question of whether the plans are primarily for the purpose of providing compensation for a select group of management or highly compensated employees. Let's analyze the text carefully.

The plan must be for a "select group." That word select is not defined. When words are undefined, the plain ordinary meaning should be determined. Merriam Webster defines select as "chosen from a number or group by fitness or preference."

Thus in this context, there must be a group of participants were chosen by preference and it's established by the company. So by the preference of the company.

Objectors believe that eligible must have "substantial influence through negotiation or otherwise" over their participation in the plan. The objectors note that they had no leverage or bargaining power. See for example, Dr. Paroist Declaration at paragraphs 4 and 5 and Dr. Lidon's Declaration at paragraph 4. Again participants Exhibits 8 and 10.

The plans were voluntary and there was no adjustment. They also argue that there was not -- they were

not expressly told how the plans worked. And you can see participants Exhibit 8, Dr. Paroist Declaration at paragraph's 4 and 5.

I would note that there are a few cases outside of this District giving consideration of bargaining power and leverage, elevated status. There's also some Department of Labor guidance. I'm not talking about negotiating power. But that doesn't make it right.

Select here is used as an adjective. It modifies the word group, which is the noun. Select is used here as defined and it refers to a chosen group by preference. The company sets the criteria, salary and title. Thus a VP making $180,000 can get in, but maybe an employee with a high salary with no title, does not get in because they're not part of the select group which requires both.

Strict textualism provides the answer here. The Court also notes for the record that the information in the plan documents saying it's unfunded and subject to the claims of creditors and the participants had no ownership in the funds and that they may become unsecured creditors where stated in plain English. They were also stated plainly in the document.

I think it's important that that information was not buried in a footnote or kind of buried in small font after a long legal description to hide these facts, right. It wasn't

like in the last page of a hidden plan document, in small font on page 60 of, you know, a document there. It was plain and simple on a four-page document.

The Court also notes that I think words matter. Now any participants must be held to the terms of what they agree to the same way far less sophisticated parties are held to legal documents.

I think words matter and they have to matter. They have to matter for every person -- whether you're a doctor or you pick up the trash at the hospital. Everybody gets treated the same. And everybody signed a contract. It is my job to enforce that contract as written.

The Court also notes that the Supreme Court in the *Loper Bright* (phonetic) decision -- and that's 603 US 369 at 412, 413, 2024 confirmed that courts should conduct statutory analysis and not give elevated prominence to any guidance -- agency guidance. Text, again, is always the alpha.

Note that United States District Court Ellison (phonetic) in what I would call the Tolder case -- *Tolder versus RBC Cap Markets Corp.*, 2015 Westlaw 2138200, Southern District of Texas, April 28, 2015 case said that he acknowledges but does not expressly adopt a substantial influence or bargaining power factor for use in determining the Top Hat issue, which may be, as he said, at most the part of the over arching selectivity factor and not a separate

independent test for purposes of the Top Hat exemption.

Judge Ellison is exactly right here. It's a consideration, but there is nothing in the text implying that selectivity requires finding influence of the employee or bargaining power. Courts must read text literally.

If Congress wanted to add terms or qualifications, it would have done so. Text is always the alpha.

A select group must also be management or highly compensated employees. This is written in the disjunctive. So it's management or highly compensated employees. Highly compensated is not defined either. So I'll mention in a moment, courts have considered factors to sort this out in a case.

We know what compensated is and we know what high is. And each of the objectives is making over $350,000. I do not think that any of them would dispute that they are not highly compensated employees.

It's also important to note that the text says it must be primarily for providing deferred compensation to a select group. It's not exclusive. So even if a hand full of participants fell outside of this select group doesn't visaed a plans Top Hat status.

Judge Ellison in Tolbert and the Second Circuit have held that the inclusion of small groups of "extra participants" is not fatal to the plans status. And that's

Tolbert, 2015 WL 2138200 at Star 10; *Demory* (phonetic) 216 F3d at 289.

I think it just makes sense, all right, and it makes sense. It gives effect to the use of the word primarily in the statute. And courts ought to read statutes as to give effect to every word.

It also allows companies and, right, to avoid the impossible standard and potentially protects employees by note letting a company commit an accidental foot fault by including someone else out of the select group and triggering like tax exposure for plan participants on no fault of their own.

So next we turn to the case law. And I'm on page 15 of 19. To construe whether a plan is primarily for management or highly compensated employee Courts have "considered qualitative and quantitative factors such as, one the percentage of the total eligible -- total work force, eligible to participate in the plan. That's a quantitative one.

The nature of their employment. Duties, qualitative. The compensation disparity between Top Hat plan members and non-members, qualitative. And the actual language of the plan agreement. Again, that's *Tolbert* case at Star 9.

Judge Ellison sites First, Second and Ninth Circuit cases in support. And he says that qualitative and quantitative factors must be considered holistically. And that no one factor carries more weight than any other factor

in determining whether a plan meets the Top Hat exemption.

Mr. Lombardo and Ms. Potter testified before the Court and I think they testified credibly about their work. There was a process and they followed the process.

The process was not perfect, though. There were some gaps and some missing information in the employee data. So objectors and the Debtors each presented a financial expert at trial.

Based on the record, the Steward plan I find operated for the primary purpose of providing deferred compensation to a select group of management or highly and compensated employees. Eligible participants in the Steward plan were highly compensated or management.

From 2019 to 2024, the records shows that only eligible employees who made at least $180,000 in base salary could participate in the Steward plan. Lombardo testified to this at page 87, lines 1 through 5 of the transcript.

Many of the plan participants made over $300,000 including each of the physician objectors. The average employee salary at Steward appears to have been about 65,000. In other words, to be eligible, an employee had to make almost three times the average employee at Steward. And participants made more than five times the average employee

From 2018 to 2024, it appears that fewer than five percent of total employees were eligible for the plan. And

only about .5 percent participated. I've recounted already the text that the Steward plan and the trust documents all of which show clear evidence of the intent and purpose of the language. And it was intended to be a Top Hat plan.

Based on the record, the IASIS plan purpose was also to provide deferred compensation to a select group of management or highly compensated employees. The IASIS plan was frozen in 2017 and only one of the objectors, Dr. Peroric, contributed to the IASIS. And the last only time she did so was more than a decade ago in 2013.

No one was eligible to make contributions after 2017. Based on the record, the average salary of the 27 participants was about -- was over -- a little bit over $350,000. Based upon the record, it appears that there were about 40 participants out of thousands. And the participants consisted of C-Suite executives -- C-Suite for the Record -- vice president and physicians.

That's Steward Exhibit 1. The average salary of all the IASIS employees, including those that participated in the plan was about $68,000. In other words, only about .5 percent of the employees who participated and the average employee -- and the average participant in the plan was about five times the average salary of all the IASIS employees.

And again, the text of the IASIS plan and the trust all said deferred income remain property of IASIS. You can

see that at Steward Exhibit 91 and everything was subject to the claims of the general assets of IASIS -- was considered part of the general participation -- general assets, excuse me, let me back up again.

The text of the IASIS plan and trust all said that the deferred income remain property of IASIS and was considered part of the general IASIS Healthcare.

Exhibit Steward 91, for example, showed that the compensation you defer become part of the general assets of the IASIS Healthcare and you are considered a general creditor of the company in the event of bankruptcy. You may receive less than 100 percent of your deemed account balance.

I note that the employee brochures encouraged the employees to speak to a financial advisor before they enrolled in the plan.

The objectors place a significant focus on the third prong, the compensation disparity between the Top Hart plan members and non-members. And as I noted, Steward and the objectors each provided an expert to opine. Dr. Joseph Crock (phonetic) was Steward's expert and I find that he testified credible.

He evaluated employee data related to the Steward plan. That's at Steward Exhibit 42, he consolidated two sets of data. The Annual Steward Census Data, which is like the entire employee data set and the Annual Steward Eligibility

Data.

There were inconsistencies between the two sets of data. Such as missing or inconsistent salary figures. And Dr. Crock made several adjustments to adjust for inconsistencies.

For example, if there was an annual salary in both sets of data, the salary from the employee data was used. And if gross compensation amount was zero or null, the maximum salary was used.

Crock spoke with Ms. Potter about his assumptions. Crock adjusted the data and assigned the salary to each employee. Crock identified salary amounts that were below the average annualized minimum wage amounts for each year.

He then removed employees before the average annualized minimum wage from the average salary calculation. That's all found at Steward Exhibit 42. To calculable the eligibility ratio, Crock's denominator was the average salary of all employees.

Crock used two different inputs and then calculated the outputs two different ways. He used the average salary of all eligible employees and the average salary of all participants.

The First Circuit in *Alexander versus Bringham and Women's Physician Org* -- that's at 513 F3d 37, pin site 46, First Circuit 2008. And the Second Circuit in the *Demory*

case, that was 216 F3d at 288. They both approved use of the average salary of all eligible employees.

I will note there was a bankruptcy case, *Alpha Natural Resources*, 554 BR 787, pin site 796, 797, Bankruptcy Eastern District of Virginia 2016 case. That approved use of the average salary of all participants.

So Crock did it kind of both ways based upon first and the second circuit and the *Alpha Natural Resources* Case. Crock ran for the Steward plan, he determined that the salary ratio for the relevant years from four to 4.6 times. And Crock ran similar calculations for the IASIS plan and found the ratio was about 5.0.

Case *Scott* Vanmeter from HKA testified for the objectors. I thought he was credible too. He evaluated the same data sets and reviewed Crock's report. Vanmeter was asked to determine the ratio of over all average salary to the eligibility threshold and to offer a critic of Crock's expert report.

Vanmeter agrees that there should be financial adjustments to address the gaps of the Steward employee data. He employed some different adjustments. They don't -- I didn't find that they differed materially from Crock's numbers. And you can look at plans participants exhibit 145, which is the Vanmeter report.

And, in fact, if one uses the Vanmeter eligible

employee numbers in the Crock ratio calculations, the ratio remains around four times. But for purposes of calculating the eligibility ratio, Vanmeter doesn't try to recreate Crock's methodology with his adjustments for the number of eligible employees.

He said, using the same denominator, but he calculated the ratio using the minimum salary to meet the eligibility threshold as the numerator. It's different from Crock's numerator which he used average salaries.

Vanmeter was asked by counsel to the objectors to exclude employees with salaries less than $35,000. And that's found in his plan participant's 145, at paragraph 35. He also testified to that on the stand.

Vanmeter testified that counsel told him that there was a document that supported his $35,000 exclusion assumption. But Vanmeter never saw it. I would note, neither did the Court.

He excluded those employees and determined that the eligibility to total average ratio -- salary ratio for the Steward plan during the relevant years was 1.8 times in 2019; 1.7 times in 2020; 2.1 in 2021; 2.0 in 2022; 2.0 in 2023, 2.0 in 2024. And 1.8 times in 2025.

So it was less than 2.0 for years 2019, 2020 and 2025. Going below 2.0 was important for the objectors. That's because the cases. Look the case law saying that no

court had found that a ratio below a Top Hat plan for highly compensated employees had fewer than two times average salary.

So based on the record, if you get under 2.0 maybe you get the Court finding that it's not a Top Hat plan. But to get the math working a difference maker is that you've got to exclude everyone -- even using Vanmeter's calculations -- excluding everyone under $35,000.

And voila, the math works to get it under 2.0 for a few years. That's the assumption Vanmeter was given. Vanmeter also used minimum salary as the numerator. There's a case -- there is a case out there that's not cited much. It was called the seminal case. I think it was the objectors counsel believe that it is seminal.

But I would -- that case is *Dafate versus Advest* 2008 Westlaw 190436, Northern District of Ohio, January 18, 2018. I find that it's an outlier case, but I appreciate the point that sometimes averages skew the data.

But I found Crock's analysis and metrics credible. I think the Circuit Analysis in the *Alexander* case by the First Circuit and the *Demory* analysis in the Second Circuit is sound as well.

I also adhere to Judge Ellison's wisdom that the prong should be viewed holistically. Right, getting under 2.0 was certainly a goal. But there's no set ratio that should be a gate keeper. And I'd note that Steward had over 30,000

employees at one point.

So the statute has to work for Steward, a small company and the synagogue. So for these reasons I'm going to find that the plans are all Top Hat plans, right. They all get above -- if you adjust the numbers -- well above 2.0. And you've got to make math assumptions and employee non-circuit level cases to kind of get there.

But again, if you look at it holistically, there's nothing wrong with using them there. And I think they're the right analysis. I think the plan documents are clear and unambiguous. They all say the plans are unfunded and subject to the claims of creditors.

No one paid taxes. Everybody was okay with that. Nor became subject to taxation during the relevant period. That was the deal. I've got to enforce that deal. I cannot change contracts when the language is ambagious.

Steward has no choice in this case but to put all of its assets on the table. That's what happens in bankruptcy. Steward has an absolute obligation to put all of its assets at the property of the estate subject to the claims of creditors. Unless there's a real basis to do so.

But not here. It absolutely has to ask for the authority to do so in this case. All of the Debtors leader and equitable interest in the plan automatically property of the Debtors estate. And that happened the minute a bankruptcy

case is filed.

It is what makes bankruptcy law very unique in all different ways simply filing a bankruptcy petition creates an estate of all legal and equitable interest and the Debtor's interest in property.

And the Debtors certainly had an interest in all of these documents and all these trusts and these plans on the petition date. It was funding all of them with general assets of the estate. They all said that they were subject to the claims of creditors.

So, it is no surprise to this Court, the official committee of unsecured creditors and other creditors are looking to this -- these funds. When you look at it this way, the funds in the plan were never the property, right, of a plan participant. But they are unsecured creditors and they share as unsecured creditors.

And I would note they all share with equal rank to that, but they don't have a special right to any of these funds. It leads to a difficult decision by the Court from a human element but not from a legal element. And it is the legal element that I took an oath to uphold.

There are allegations that Steward may not have closely followed the oasis trust documents. I do find, again, that those are best breaches in giving rise to pre-petition claims.

Here the funds are subject to the claims of creditors and the plan participants or general unsecured creditors. There are people who remain -- so are people -- I would note, there are plenty of people who remain unpaid for services. Unpaid. All right, for services rendered but remain unpaid.

There are plenty of them. I'm sure Ms. Schultz has heard from plenty of them. The unsecured Creditors Committee has told me on many occasions that they're investigating potential causes of actions to increase the estate, to get the people, unsecured creditors, the greatest distribution possible for all.

To make the pie as big as possible so that there is a fair and equitable -- excuse me, fair and legal distribution. But to me Steward has established business judgment to terminate the trust and to relieve the Trustees and related bookkeepers from their duties.

The plans are already terminated. And the trust assets are already subject to the claims of creditors, all right. They always were. They were before the case files for bankruptcy. They would be outside of bankruptcy.

Nothing has changed that in bankruptcy. Steward is in bankruptcy. Use of the funds is subject to court approval. So I'm going to order the Trustees to deliver the trust assets to Steward, which is what is required in the trust agreements

already.

Note that today, for those who may be listening. I'm not deciding how the assets maybe used. That's for another day. And that's no request about that for me. I'm only deciding where the Trustees must send them and relieving the Trustees of their duties. So they're not caught -- not subject to any further responsibilities in connection with this case.

And relieving the bookkeepers of their duties. That is the Court's ruling. And I'm going to grant the motion as requested -- I'm going to ask the Debtors to put the funds -- once I know that they can be either -- there's cash. They can bring cash. They may be processed to liquidate them.

They're already subject to the claims of creditors and I think it would certainly -- because these are subject to the claims of general creditors, I want them at least segregated until you file whatever you file when you ask me for it.

So I think the process is what it is. It's another case for another day as to how you use them. But just so that -- I mean segregate just so I can tell that it got accounted for.

Like we can tell that these are funds that came into the estate from the trust. And so that everybody can see there was X amount in the trust and then X amount got

delivered from the Trustees.

And I want to make sure that the Trustees and the bookkeepers are relieved of their duties and that they feel comfortable that they have an order from the Court. So any kind of duties that they felt like they had -- certainly like the Trustees under the trust agreement -- that they feel relieved of those duties and that they can feel comfortable that when they hand things over they did it under a court order and they're safe.

So, that is the Court's rulings. I'd ask if there are any questions.

MR. KEACH: May I approach, Your Honor?

THE COURT: Yes, Mr. Keach.

MR. COHEN: Your Honor, may I be heard.

THE COURT: Mr. Keach got up first so I'm going to let him ask the first question and then you can certainly go Mr. Cohen.

Mr. Keach.

MR. KEACH: Sure, I actually have a -- some motions to make. So if you want to take that question, I'll wait.

THE COURT: Sure. Mr. Cohen?

MR. COHEN: Yeah, one question. We had actually uploaded a form of proposed order as an attachment to docket number 3277, which I have included language --

THE COURT: Yeah, that's what I plan on signing.

MR. COHEN: Okay, great. And then we just wanted to --

THE COURT: Hang on, what Mr. Keach was telling me. That's what I was planning on signing. Go ahead.

MR. COHEN: And then the only question, Your Honor, is you made some commentary at the end the funds maybe put into an account and then there's a requirement for sort of a separate request for how to use the funds.

Our understanding, Your Honor, once they're transferred the funds have actually already been liquidated by the Trustee. They're sitting in a separate account already. That was done by stipulation.

THE COURT: I don't mean like segregated -- I don't mean segregated like you opened up a new bank account. They're already subject to the claims of general creditors, right. So what I mean is I just want a procedure, Mr. Castalano, so that one can say you -- it's like you can document. Like I'm making something up. There was a 20 million bucks here and here it gets transferred. There were some life insurance policies. Those life insurance policies got liquidated in this amount and that amount got transferred.

What I want is there just to be clear documentation because I know that this is what's held in these trusts are in several different forms or maybe they were at one point. I'm just kind of going -- you would know what's best.

But there was a mutual fund. That the mutual fund got liquidated and that generated X amount of dollars that one can then say here it is. And then it's not just one big -- someone can then kind of look at this.

I want there to be transparency in what happened because it's -- and I'm protecting the Trustees as well, right in that they feel comfortable that this got there. So that's my ruling.

And by segregated, I mean I meant not like you're creating a separate account. I meant segregated like you have it and you can track it. In my reading of this is that it's always subject to the claims of creditors already.

So if somebody wants -- if the money is going to be used, it has to be used, right, for the claims of creditors, right. And so somebody -- I just there to be clarity, you know, about kind of what's happening.

So if there's a motion then one can then -- Mr. Castelano can -- I can feel comfortable that the money came in and that if there is a request for relief that everybody is clear that -- I'm doing this from a transparency standpoint that there's no question that money subject to the claims of creditors and I'm sure Ms. Schultz and the committee is going to be all over this.

But I'm doing this -- that it was actually going to pay creditors not for some other -- not some other purpose.

And I know nobody can do anything without Court approval. I'm just saying it so that it is said, that there is transparency in the process.

Mr. Keach, let me turn things over to you, sir.

MR. KEACH: Sure, thank you, Your Honor. Robert Keach for the certain participants in the deferred compensation plan.

It's actually -- let me take a few things in order, but the first point goes preciously to the point counsel was just making about the form of order. As Your Honor knows, the motion for turn over was also a motion for turn over and use of the funds.

And to the extent relying on Section 363 it also implicates Bankruptcy Rule 6004(h) which would provide a 14-day stay with respect to any use of the funds.

The Debtors in their form of order at paragraph 5 propose that the entire 14-day stay be waived and that the order be immediately effective and enforceable upon its entry. The case law is pretty clear that when there is an objecting party that intends to appeal. and obviously we do, that a waiver of the automatic 14-day stay is completely inappropriate and frankly has Article III implications.

And we would ask that that provision of the order be stricken and that 6004(h) apply. And that there be a 14-day stay.

THE COURT: What is going to happen in the next 14 days? How is somebody going to use the money?

MR. KEACH: Well the Debtor is posing, again, I'd ask the Court to look carefully at the motion of the order. But the Debtors proposed to use the money to the extent that they can and they certainly could use it, for example, in the ordinary course. They could use it to pay fees that have already been approved. They could use it to pay their DIP lenders under the terms of the DIP lending agreement.

And so we think it's important that the order not be effective under 6004(h) and that that 14-day stay apply. It's certainly not appropriate to waive the entire stay period.

There are a number of cases we keep going back to Little H Judge Cary in this case, but in filing, for example, he specifically construed 6004 to say that if there's an objecting party, it's always inappropriate to waive the 14-day stay.

THE COURT: So, Mr. Cohen or I'll hear from anyone. What's the response?

MR. COHEN: Judge I guess with I do intend to use the funds. You know, we do have a DIP that's maturing on Friday at this time. Your Honor, I think there was an intent to use the funds to make sure we can get that DIP extension and use, you know, what's really the lender's cash collateral under the terms of the cash collateral order pursuant to

whatever terms you may agree with the DIP lender on a further DIP extension.

But I can turn it over to Mr. Berezin if you'd like a little more detail on that.

THE COURT: Okay, Mr. Berezin.

MR. BEREZIN: Yes, Your Honor. Thank you. Robert Berezin, Wails, Gotshell and Manges on behalf of the Debtors.

Mr. Castellano is on the line. If it's pleases the Court I could provide a proffer that Mr. Castellano is prepared to testify to and then he could be cross examined as needed on exactly, you know, the justification for -- not just the 14 days, but in general why these funds are needed and --

THE COURT: I don't think you need to tell me that they're needed. I know why you need them. And I mean, I know that -- I think it's a more fundamental problem. I don't think -- there's no right to this money.

The documents, the case law is super clear, right.

MR. KEACH: Well, with respect, Your Honor, we --

THE COURT: It's super clear and everything has been and I think the -- this is where I start to think about the adversary proceeding.

Everything and it started with the adversary proceeding. Everything has been a run out the clock issue here. And I don't see -- I heard the evidence. I read the cases. I heard the evidence.

The case law is -- there's circuit authority here. There's district court authority.

MR. KEACH: Well, Your Honor, with respect, we'll respectfully disagree and I'll get to that point in a second. But on the issue of 6004(h) there is no case that supports a eliminating the 14-day stay in its entirety so that the Debtors can dissipate these funds before we have an opportunity to appeal.

THE COURT: I think you can appeal. I think you can go upstairs tonight -- tomorrow.

MR. KEACH: Well, we intend to Your Honor. First I intend to ask Your Honor for a stay. But let me get through these first two points first.

I think the order must be under applicable case law and frankly under Article III consideration, must be modified to allow the participants a reasonable opportunity to seek a stay pending appeal.

Not only from Your Honor but at the next level. Which we are prepared to do expeditiously. But there is no basis whatsoever for eliminating the entire 14-day stay under 6004(h).

In addition, Your Honor, we would ask with respect to the remainder of the motion that the effective date of the order, also be deferred for a similar period of time to the extent it implicates Sections other than Section 363.

And the authority for that is under 8007(e) where the Court can enter an order to protect the interest of the parties pending appeal.

Again, we just want to make sure nothing happens to this money until we can get in front of an appropriate court respectfully request for a stay pending appeal assuming Your Honor doesn't grant the motion I'm about to make.

THE COURT: Okay, why don't we deal with that one first and then we can --

MR. KEACH: Sure. Well, Your Honor, as is the practice in these things, we move a stay pending appeal under 8007(a). There is a four part test. Obviously for that. Likelihood for success on appeal, irreparable harm, no harm to the Debtors or balance of funds favors of participants and public interest.

Let me take those quickly one at a time. The lengthy success on appeal has been construed by the Fifth Circuit in this context to mean that the participants have a more than negligible chance of success on appeal.

With respect to -- with all respect to Your Honor, there are in Your Honor's decision a number of issues of law where Your Honor has gone one way or the other.

I think Your Honor's strict textual analysis is frankly at odds with virtually all of the case law in this area. I accept the compliment on my expertise and would lean

on that expertise to say it's highly likely that the District court would see it differently and certainly having likely that the Fifth Circuit would see it differently.

So I think we do have a more than --

THE COURT: Let me just get this right. So you think it's highly unlikely that the Fifth Circuit is going to see it differently than Textualism and Tolbert?

MR. KEACH: I think Your Honor's textual analysis ignores the purpose of the statue and ignores the dominance theme in the case law.

I could --

THE COURT: I got it. I just want to make sure. I just want to make sure that we --

MR. KEACH: I'm not suggesting that I know the Fifth Circuit better than Your Honor, but I do think the case law --

THE COURT: Oh, I'm not saying --

MR. KEACH: -- doesn't to favor that --

THE COURT: I tend to stay out of Fifth Circuit business. I kind of just stay -- keep matters on the fourth floor and let the folks above on the higher floors do what they do.

So, but I just wanted to make sure that I take that -- that I understood the argument.

MR. KEACH: I think the argument is, Your Honor, that there are number of issues of law. One the rule of

bargaining power. Two, what test you have to use in selectivity. Any of those issues of law could go in our favor and would result in reversal.

And I think that establishes the more than negligible chance standard.

THE COURT: Understood.

MR. KEACH: With respect to irreparable harm I think you just heard it. The Debtors intend to pay this money to their DIP lender. The Debtors intend to pay this money to administrative creditors who's claims have already been approved.

If there's no stay, then this money is gone. And the participants -- if they win on appeal and we think we have a good chance to win on appeal -- doesn't have to chase the recipient to those funds in an attempt to get them back.

That has been found by case after case to be irreparable harm for this purpose.

The Debtor's frankly are not harmed. Will creditors just have to wait longer for payments they may get later? Yes. They've already waited a long time as it is. They can wait a little longer.

This really has to do with cleaning up a liquidating case. It's not a reorganization case. There's no business to be saved here. To the extent the business could be saved, they were saved through the sale process.

But there's no comparable harm to the Debtors to the harm suffered by the participants if we have to chase the funds.

And lastly there's a serious and strong public interest in protecting retirement funds under ERISA. We think this case implicates that public interest. But there's also a public interest frankly in seeing that these participants have a fair opportunity to appeal.

For those reasons, we think a stay pending appeal under 8007(a) is justified and we move Your Honor for such a stay.

THE COURT: Okay. Anyone wish to be heard on the phone line? There was a -- does anyone wish to be heard?

MR. PRICE: Mr. Michael Price from Milbank on behalf of the DIP Lenders.

THE COURT: Okay.

MR. PRICE: I just want to note that under the DIP credit agreement and the DIP order, there's a requirement that these proceeds be used and paid over to the DIP lender --

THE COURT: Mr. Price, that's not going to move me one way or the other today.

MR. PRICE: No, I just wanted to --

THE COURT: That kind of pay the DIP says it. I know what the DIP says. I approved it. It says what it says and I understand the arguments.

I just want to know about 8007, that's what I'm working on now. Anything else, that's where I want to focus respectfully.

There maybe consequences and the consequences will be what they are. If that's what I rule, that maybe there's not. But I'm well aware of what the DIP documents say. I'm incredible versed on all these things. And I got it.

MR. PRICE: I knew you would. And I only raise it to preserve our rights and also to just to speak to what I think is a relevant consideration, which is that the DIP matured in December. It's been extended several times in connection with allowing a mediation and negotiation around the resolution of these cases and potentially the use of these proceeds to facilitate the resolution of these cases.

That's ongoing. The DIP is currently extended through this Friday. Obviously the availability of these proceeds is going to be central to whether or not it makes sense to continue that settlement discussion.

And also whether or not the DIP would be further extended. And so I rise to note that for Your Honor.

THE COURT: Thank you.

Anyone else wish to be heard? Mr. Berezin, hold on a second.

MS. SCHULTZ: Good afternoon, Your Honor. Sarah Schultz --

THE COURT: Ms. Schultz.

MS. SCHULTZ: -- for the Record, Akin Gump Hauer & Feld on behalf of the Creditors Committee.

Can you hear me okay?

THE COURT: Just fine.

MS. SCHULTZ: Great, thank you, Your Honor.

Your Honor, I'll be very, very brief here. But I only want to address the question of harm to the estate. I heard counsel say that it was fine to make the creditors wait. Respectfully I disagree with him. As Mr. Price said we are in the middle of plan negotiations that have the potential to generate real returns for creditors.

And I think that a lengthy stay here has the real impact of potentially upending that. You know, it could have a very negative impact for the rest of the estate creditors.

THE COURT: Mr. Keach, why don't you put up a $60 million bond?

MR. KEACH: Your Honor, we think a bond is inappropriate here because the money can stay where it is and there's no impact on the estate with the money staying where it is.

I think, Your Honor frankly should be indifferent to whether this case liquidates in a 7 or through a plan.

THE COURT: I'm not worried about it. I just -- I can't find any basis to -- that based on the documents, the

testimony, the Southern District of Texas case law, Fifth Circuit case law, and sister circuit case law that says that you're right. That's what I'm wresting with.

MR. KEACH: I hear you.

THE COURT: And I got it. You want me to accept an expert who was told to exclude $35,000 and then do a calculation to get it under the 2.0.

MR. KEACH: And, Your Honor's ignoring the fact that there's actually testimony that that number was actually too low to exclude all of the part-time people.

THE COURT: But I'm not ignoring it. I'm just saying what your expert testified when they ran based upon the information that they were given. That testimony is unrefuted.

MR. KEACH: That testimony is actually supported by Ms. Potter's testimony --

THE COURT: Got to connect.

MR. KEACH: -- that the number was 36,400 not 35.

THE COURT: But let me ask you. What was -- what was your experts testimony on the issue? That he was told to do it by counsel based upon a document that he never saw, that's his testimony.

MR. KEACH: And that assumption that we made for the purposes of that testimony turned out to be correct.

THE COURT: Tell me where in the evidence it shows

that you made that assumption.

MR. KEACH: Potter's testimony is that the --

THE COURT: No, not -- in --

MR. KEACH: -- lowest --

THE COURT: I'm not talking --

MR. KEACH: -- well, that the lowest --

THE COURT: -- about that.

MR. KEACH: -- full-time salary --

THE COURT: I'm talking about your --

MR. KEACH: -- was thirty-six four.

THE COURT: -- testimony from a witness of yours that testifies that that's the assumption and that's the reason you made the assumption.

MR. KEACH: We don't need a witness of ours to do it, their witness said it, Your Honor.

THE COURT: No. You're telling me why you made the assumption that it was 36,000 --

MR. KEACH: Right. Because we --

THE COURT: -- or why he was told --

MR. KEACH: Because --

THE COURT: -- it was less, to exclude $35,000, as opposed to just a math calculation.

MR. KEACH: Right. Because we knew from our own analysis of the documents we did have that no full-time employee was making --

THE COURT: Tell me where that's --
MR. KEACH: -- 35,000 --
THE COURT: Tell me where that's in the record, that he knows that.
MR. KEACH: No. We asked him to make that assumption because we knew it would be supported by the witness testimony and it was.
THE COURT: Okay.
MR. KEACH: I mean, you --
THE COURT: And again --
MR. KEACH: You can't just ignore the fact --
THE COURT: I'm not ignoring it.
MR. KEACH: -- that their witness --
THE COURT: I'm not --
MR. KEACH: -- testified --
THE COURT: -- ignoring it.
MR. KEACH: -- that that actually is the threshold.
THE COURT: I'm not --
MR. KEACH: His calculation was correct. In fact, his calculation was too conservative.
THE COURT: Well --
MR. KEACH: And again, Your Honor, I'm not asking Your Honor to reconsider here. But I think --
THE COURT: I got it.
MR. KEACH: -- I'm highly confident that there is a

good case for appeal here on a number of grounds, and I say that with all respect to --

THE COURT: No, no, no.

MR. KEACH: -- Your Honor's --

THE COURT: I got it.

MR. KEACH: -- careful consideration.

THE COURT: No, no. I got it.

MR. KEACH: And look, it is inherent -- and I, again, hate to bring Judge Carey back to this discussion. We had this discussion in New Century. It is inherent in the fact that one has to bring a motion to stay pending appeal before the Bankruptcy Court that just ruled against it.

THE COURT: Oh, I understand. No, no, no. I agree.

MR. KEACH: Okay.

THE COURT: No, no. It's required. Yeah. No. That's exactly right.

MR. KEACH: Right. So, in any event, Your Honor, we do think there is a, again, more than negligible chance. We think that an appeal has substantial here. And we believe a stay is necessary to allow us to do it, particularly given that the Debtors have just admitted they plan to spend all -- as much of the money as they can.

THE COURT: No, no. And I appreciate it. And I wanted to get that out on the record, too, so that we had a good, clean record about the way that goes.

MR. KEACH: And I would --

THE COURT: Go ahead, Mr. Keach.

MR. KEACH: Sure. And I would say, Your Honor, again, first and foremost, we ask Your Honor to stay this pending appeal. If Your Honor is not inclined to stay pending appeal, I return to two points:

The 6004 point, which is this order should not become effective, so that, if Your Honor denies the motion to stay pending appeal, we can get to the next level. I think the order should, just generally, not be effective for the 14 days, so that we can file appropriate pleadings with the District Court and take it up the ladder.

The last point I'll make, and it's the similar one to the one Your Honor was making, except I would go a little farther, and that is we would ask that, under 8007(e), Your Honor also order the Debtors to disclose where the money has been spent. In other words, if the stay runs out and they spend the money, we would like a disclosure as to who the recipients of the money are -- consist of and what amounts they were paid because --

THE COURT: Money from --

MR. KEACH: -- if we're right on appeal --

THE COURT: Money from what time point?

MR. KEACH: From this point forward. In other words, the funds, as Your Honor will recall, sit in two

segregated accounts now. By agreement, we allowed them to liquidate the securities --

THE COURT: Right.

MR. KEACH: -- and related assets and --

THE COURT: Right, right.

MR. KEACH: -- IASIS and to cash out the cash surrender value of the policies. So, as far as we know -- and we haven't received a full accounting of this -- there's money sitting in two separate accounts. So, from those accounts, we'd like to know where it goes, not only that it goes to the Debtors' accounts, but also who do they pay with it. That's essential for tracing. And I'll put everybody who's on the phone on notice now. If we win on appeal and they spend the money, we're coming after the recipients because it's -- they're receiving my clients' money.

THE COURT: So why don't you all give me about -- I want to check something, and I didn't bring what I wanted to bring. Give me about ten minutes and I'll give you an answer to these questions. Thank you.

MR. KEACH: Thank you, Your Honor.

THE COURT: Oh, Mr. Cohen --

MR. BEREZIN: Your Honor?

THE COURT: -- did you wish --

MR. BEREZIN: May I be heard?

THE COURT: -- to say something before I broke?

MR. BEREZIN: (Indiscernible) Your Honor, can you hear me?

THE COURT: Yeah.

MR. BEREZIN: It's Robert Berezin.

THE COURT: Yeah, go ahead.

MR. BEREZIN: Okay. Yeah, Your Honor, before you rule, I was hoping to make a proffer for Mr. Castellano, so we could have a record --

THE COURT: I --

MR. BEREZIN: -- regarding --

THE COURT: I think that's fair.

MR. BEREZIN: -- you know, injury.

MR. KEACH: I have no objection --

MR. BEREZIN: Okay. May I proceed?

MR. KEACH: -- to him making a proffer.

THE COURT: That's okay. So Mr. Castellano, can you raise your right hand? Do you swear to tell to truth, the whole truth, and nothing but the truth? Oh, hold on. Let's see. Mr. Castellano, there you are. I can't hear you, Mr. Castellano.

UNIDENTIFIED: He appears to be muted.

THE COURT: Mr. Castellano?

(No verbal response)

THE COURT: I can't hear you.

I think I just heard you. Mr. Castellano?

(No verbal response)

THE COURT: I still can't hear you. I'm sure it would have been a great proffer, Mr. Berezin.

MR. KEACH: If the proffer is the Debtor has uses of the funds, I think we understand that, Your Honor.

THE COURT: Yeah.

MR. BEREZIN: No, I'd like to make the proffer, if possible.

THE COURT: No, no, no. I'll let you do it. Let's just get him on the line. Mr. Berezin, are you --

MR. BEREZIN: Yes.

THE COURT: -- about to get Mr. Castellano? Are you there? Why don't we -- why don't we figure all that out, get him on the line. I will get one of my law clerks in here -- oh, actually, you know what? Yesenia, can just make sure, once he's on the line, Yesenia, once he's on the line, can you just work with these folks and just make sure. There may be someone who can click five-start to unmute the line. Do you know how to do that?

(Court and court personnel confer)

THE COURT: Okay. I'll get -- one of my law clerks will do it. Why don't we just try to figure this out in the next few minutes and then I'll come back out. Okay? Thank you.

MR. KEACH: Thank you, Your Honor.

MR. BEREZIN: Thank you, Your Honor.

THE COURT OFFICER: All rise.

(Recess taken from 4:37 p.m. to 4:49 p.m.)

THE COURT: Please be seated. Okay. Please be seated.

All right. Mr. Berezin, I see you there.

MR. BEREZIN: Okay. Can you hear me, Your Honor?

THE COURT: Okay. Mr. Castellano, can -- I hear you're good.

MR. CASTELLANO: Can you hear me, Your Honor?

THE COURT: Yes. Alrighty. Mr. Castellano, let's just do this officially. So I'm going to have you raise your right hand.

JOHN CASTELLANO, WITNESS FOR THE DEBTORS, SWORN

THE COURT: Okay. And do you understand -- you can put your hand down. Do you understand the oath that you took is the same that you would take if you were live in the courtroom here with me?

THE WITNESS: I understand.

THE COURT: Okay. We're going to proceed by proffer, which is that Mr. Berezin is going to make statements, but they are statements that you would -- proffering your testimony that you would have provided if you were testifying live before me. Do you understand that?

THE WITNESS: I do.

THE COURT: Okay. So, when he's done, I'm going to ask you if those statements are true and correct and your -- if there are any corrections to anything that he said that you would make. Okay? Because you would be adopting that proffer as your testimony.

THE WITNESS: I understand.

THE COURT: Okay. Mr. Berezin, whenever you're ready.

MR. BEREZIN: Okay, Your Honor. For the Record, Robert Berezin, Weil Gotshal & Manges, for the Debtors.

If asked to testify, Mr. Castellano would testify to the following:

If the Debtors are unable immediately to access the funds that were held in the two Rabbi Trusts, then Debtors' ability to continue to operate over the next 14 days depends on whether the FILO DIP lenders will agree to extend the DIP loan's maturity date from April 4th, 2025, and to do so without requiring the Debtors to make a further prepayment on the DIP loan during that period.

A DIP maturity extension is required because the Debtors have no unencumbered cash with which to operate and presently lack the funds to repay the DIP loan. An extension without requiring additional prepayments is necessary because such a prepayment could leave the Debtors without sufficient liquidity to operate during the whole of the next fourteen-day

period.

I have no assurance that the FILO DIP lenders will agree to extend the DIP loan or to do so without requiring a prepayment. The Debtors have, so far, made approximately $29 million I prepayments to obtain prior extensions of the DIP loan's maturity date. Even if such a two-week extension were granted, I do not believe that the Debtors will be able to continue to operate much beyond that period, and certainly not for an additional month or longer, during the stay pending appeal of Debtors' right to the approximately $62 million at issue.

First, the DIP lenders would need to extend the DIP loan's maturity date and do so with little or no prepayments for the reasons previously mentioned. I also have no assurance that the FILO DIP lenders would agree to extend the majority date or do so on those terms during a longer or indefinite stay pending appeal.

Second, and most importantly, the Debtors would require incremental new money financing to continue operating while an appeal was pending, and the Debtors do not have access to such financing. Based on my interactions and dealings with the FILO DIP lender, I believe that they will not agree to provide additional incremental liquidity to fund the Debtors' operations during an appeal. I also do not believe that the FILO DIP lenders would agree to subordinate

their claims or liens to another lender willing to provide such incremental liquidity, nor do I believe that the Debtors could obtain a loan from a third party that would be junior to the FILO DIP lender's claims and liens.

I, therefore, believe that the Debtors will be unable to continue operating in Chapter 11 during an indefinite stay pending appeal; and, in that event, any prospect of confirming a liquidating plan and monetizing valuable litigation assets for the benefit of administrative expense and other creditors, would be lost.

That's the end of the proffer, Your Honor.

THE COURT: Mr. Castellano, you heard the statements. Do you believe they're true and correct?

THE WITNESS: I do.

THE COURT: Are there any corrections you would make to anything he said?

THE WITNESS: I would not.

THE COURT: Okay. Mr. Keach, do you have any questions for --

MR. KEACH: The only thing, Your Honor, I would move to strike the testimony, to the extent that he was speculating on what the DIP lenders might do in the future. Beyond that, I have no objection to the proffer.

THE COURT: Any response, Mr. Berezin?

MR. BEREZIN: Yes. Given Mr. Castellano's

experience on this case dealing with the FILO DIP lenders since at least January, if not earlier, of 2025 -- 2024, I believe that his observations and beliefs are well grounded in fact and are -- should be admissible.

THE COURT: I'll take it that that's his understanding and not for the truth of the matter of what they may or may not do. Although I do know that there were certainly arguments made that would certainly that to be the fact.

Here's what I'm going to -- here's what I'm going to do. I'm going to talk about the stay pending appeal first, and then I'm going to talk about the order second.

So I'm going to -- we all know Bankruptcy Rule 8007(a)(2), and Mr. Keach is absolutely right. There's got to be -- a motion for a stay pending appeal must be first filed in the Bankruptcy Court before it can be considered by the District Court. It just creates something where you then got to come back down and it's just -- it's easier just to do it right now, so I think that makes a lot of sense.

A party requesting the stay of a Bankruptcy Court's order pending appeal, ordinarily, must move first in the Bankruptcy Court. It's written in (a)(1), 8007(a)(1).

And the motion may be made, either before, or after the appeal is filed. And that's Federal Rule -- Bankruptcy Federal Rule 8007(a)(2).

The standards for granting a stay pending appeal, Mr. Keach knows they're well established. It's one where the stay applicant has made a strong showing of likelihood of success on the merits, whether the applicant will be irreparably injured absent a stay, whether issuance of the stay will substantially injure the other parties interested in the proceeding, and where the public interests lies. And I would cite there *Voting For America Inc. v. Andrade*, A-n-d-r-a-d-e, and that is 488 F. App'x 890, pin cite 893 (5th Cir. 2012). And I would note that it is quoting *Hilton v. B-r-a-u-n-s-k-I-l-l*, 481 U.S. 770, 776 (1987). Courts have discretion on whether to grant a stay.

So I'm going to -- I'm going to -- I'm going to note that, for the standard of whether the stay applicant has made a strong showing that they're likely to succeed on the merits, I understand the arguments made by counsel; I just respectfully disagree with that. I think the ruling is consistent with text, consistent with case law in this Circuit, consistent with federal circuit authority and applied to the law and the facts in this case. So I don't think that the applicant has made a strong showing of likelihood of success on the merits there.

Whether the applicant will be irreparably injured absent a stay, I think it comes down to what I do in the order. But I do note that, if the money -- there is potential

there for irreparable injury if the money is used under prior court order authorizing use of cash and, therefore, creates an issue before someone can actually even get to a district court to ask for relief, asking for appellate review.

And it -- whether it substantially injures other parties interested in the proceeding, I think the answer to that is yes because some -- it injures the Debtor because the Debtor is going to, arguably, be without money to use and the Debtor is going to run out of cash, and that is -- that's just a fact here.

And where the public interest lies I think is an interesting question. I think the public interest -- I think the public interest supports reading contracts and agreements and not introducing equity until you really have a basis to do so, but you ought to stick to law and facts and reading what words say and what people understood at the time, and not to start -- Bankruptcy Courts, I'm even noting even in the most recent Highland decision issued by our Chief Judge Elrod, and she reemphasized that Bankruptcy Courts aren't roving commissions to go do equity. And I think there's a public interest in holding that.

And if something has always been subject to the claims of creditors and someone hasn't paid taxes on money in years, to then -- maybe they just ought to be held liable to the deal, the same way someone who doesn't pay their car note

or doesn't pay their home sometimes lose it in foreclosure, or sometimes a -- they get -- cars get repossessed, or sometimes someone who has a lien on cash can go exercise it and sometimes it's a bank. And you know, strict enforcement, treating everybody the same, and I think the public interest lies in equity.

So I'm going to -- I'm going to deny a stay pending appeal in this case. But I do think I have to provide access to the courts and I've got to provide a meaningful opportunity to the courts. And today is Wednesday. And I would note we held a hearing March 26 and March 27. It's just -- just give me one second.

(Pause in the proceedings)

THE COURT: I'm giving you a ruling 6 days after a two-day hearing, after 200 exhibits. That's been reviewed and you got 18 and a half single-spaced pages of factual record, review of evidence, and decision. So I moved incredibly fast, not rushed. But I knew the parties had -- both had an interest in getting an answer to this question.

And so I'm going to make the order effective, I'm going to prove -- I'm going to amend the order and say that, notwithstanding Bankruptcy Rule 6004(h), the order is going to become effective on April 11th at 11:59 central time. You're going to have all next week to try to get a hearing in front of -- I don't know if Judge Bennett will get it, I don't know

how that really works, to be honest with you, Mr. Keach. I --

MR. KEACH: Nor do I, Your Honor.

THE COURT: I -- no, I don't. I will -- I don't know who it is. But I do know that -- actually, the clock would run out Sunday or something. So I think, next Friday, at 11:59 central, this order will not go effective. So I will deny, orally deny, the stay pending appeal, but I'll issue the order.

And I understand that there are consequences to the Court's decision on this. And I think meaningful access to and potential review of my ruling, I think, remains a central -- I don't want to -- I think it's important that people have the opportunity to do that. And I -- there is no assurance that I could give anyone that someone could file something tomorrow and then have a hearing in -- I -- and I -- but I do think a ten-day -- well, it's really like kind of a ten-day stay of this, not counting the weekends, is appropriate and very much in line with a 6004 reading of this.

So I will -- I'm just tweaking Paragraph 5 to say this order shall become effective on April 11, 2025 at 11:59 p.m. central time. So I guess the Court's ruling, I suspect someone is going to order a transcript, or one of these fancy, twenty-four-hours ones or something --

MR. KEACH: I think we already have -- I think we already have, Your Honor.

THE COURT: Okay. So I wish everyone a good day. I'm finished.

MR. COHEN: Your Honor?

THE COURT: Yes, Mr. Cohen?

MR. COHEN: Your Honor, may I be heard with just one clarifying question?

THE COURT: Yes, sir.

MR. COHEN: We understand Your Honor's ruling that the order will go effective on April 11th. I think we just wanted to clarify and make sure that, if it so happens that the order goes into effect and it's not subject to a stay or appeal or administrative stay at the district court level, that there is not a requirement for a further motion to use the funds; and that, once the funds are --

THE COURT: It's the order. It says -- the order says what it says and it just goes effective on 11:59, April 11th, 2025, from my perspective. If there any -- I don't -- you know, if nothing happens upstairs, then the order goes effective and it is what it is. It says what it says. So I'm not --

MR. COHEN: Understood.

THE COURT: I'm not changing anything other than that. All right?

MR. COHEN: Thank you, Your Honor.

THE COURT: Thank you. You all have a good day.

Everyone is adjourned. Thank you.

MR. KEACH: Thank you, Your Honor.

(Proceedings concluded at 5:04 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability produced from the electronic sound recording of the proceedings in the above-entitled matter.

/S/ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337*

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